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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 900.

G. HAROLD EARLE and STEWART E. EARLE, Former Executors of the Estate of Emma Earle, Deceased, and Residuary Beneficiaries of Said Estate, *Petitioners,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY OF PETITIONERS TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

The brief for the respondent in opposition to the petition for a writ of certiorari was served on petitioners on February 8, 1947. This reply brief is filed pursuant to subdivision 4(a) of Rule 38 of the Revised Rules of the Supreme Court.

ARGUMENT.

1. Whether or not the Tax Court correctly interpreted the will here involved and the effect of its action in doing so are questions which are beside the point—if, as a matter of law, the respondent must tax property as it, in fact, passes under valid state court decrees. The court below recognized this principle where the state court decrees were contested (R. 89), but applied a different rule herein since the state court decree was not contested. The distinction is without substance. Where parties to a probate proceeding are agreed upon the proper distribution of the estate, they should not be forced to concoct a fictional state court fight in order to freeze the manner of distribution for federal tax purposes. It is submitted that the estate tax should be imposed on property in the manner in which it actually passes by valid final state court decrees and that respondent should not be permitted to ignore such decrees and to realign the parties in order to tax a legal entity on the receipt of property which it has never in fact received.

2. Coming to the heart of the reasons why the petition should be granted, respondent finds no conflict (Br. 10) in the cases cited by petitioners *for the reason that* the state courts had considered the issues in the cited cases. The alleged consideration of the issues in those cases appears generally to have been the signing of consent decrees. By that test the probate court decrees in the case at bar were also "considered" (R. 75, 83).

The final order in the *Henricksen* case was preceded by a stipulation of the parties and the government sought to avoid its effect on the ground that the proceeding was "nonadversary" (139 F. 2d 877, 878, 881). The alleged construction therein of the will by the probate court was affirmed almost two years later by the same court in a tax suit against the State of Washington. This so-called construction amounted merely to an affirmation of what had already been done.

In the *Frederich* case the dissenting opinion flatly says that the issue was not presented to the probate court which indicates (as does the majority opinion) that the extent of the "consideration" given the order was the same as in the instant proceeding.

The consideration given by the state court in the *Eisenmenger* case was based in part upon the entire record and briefs in a Tax Court case, but the Tax Court found the state court proceeding "was nonadversary" (145 F. 2d 103, 107).

That the present status of these consent decrees is giving trouble to the lower courts is well illustrated in two recent cases.

In *William C. Chick* v. *Commissioner*, 7 T.C. No. 163, decided December 31, 1946, the taxpayer contended that the state court decree was conclusive, and relied strongly on *Frederich* v. *Commissioner, supra.* The Tax Court did not agree with the *Frederich* case and entered its decision on the issue in favor of the Commissioner. Two judges dissented in a vigorous opinion.

In *Craig* v. *United States*, W. D. Pa., 1946 P-H Federal Tax Service, ¶ 72,612, the District Court concluded that the uncontested state court decree there involved would have been conclusive except for recent decisions of this Court and the Circuit Court of Appeals for the Third Circuit. The District Judge stated in his opinion that he believed these recent holdings had "modified" the law "as formerly enunciated" (*Ibid.* p. 72,989). Significantly, the Third Circuit has not been consistent on the matter. It held uncontested[1] state court decrees to be conclusive in *Commissioner* v. *Crawford's Estate*, 139 F. 2d 616, 618, and not in the *Child's Estate* case, cited below (R. 89).

It is submitted that the problem of these uncontested state court decrees is one of frequent recurrence and should be authoritatively settled by this Court.

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[1] That the state court decree in the *Crawford's Estate* case was uncontested appears more clearly in the Tax Court decision. *George W. Crawford Estate*, 1942 P-H Memorandum Decisions Service, ¶ 42,314.

3. The only difference between the *Weigel* case and the present proceeding is that the first involved an income tax while this case arises under the estate tax laws. Certainly, if distributions to a testamentary trust are corpus and not income for income tax purposes, they should not be income for purposes of increasing the estate tax of an income beneficiary.

4. The *Sharpe* case is the only one that has been presented in support of the far reaching principle that a party can be taxed on the ownership of property which under final state court decrees he never has or never will receive. The sweeping scope of this pronouncement clearly calls for a review by this Court.

CONCLUSION.

Uncontested state court decrees should be honored for federal tax purposes just as are contested decrees and to this end the petition for a writ of certiorari should be granted.

Respectfully submitted,

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